

108TH CONGRESS
1ST SESSION

S. 1705

To prohibit employment discrimination on the basis of sexual orientation.

IN THE SENATE OF THE UNITED STATES

OCTOBER 2, 2003

Mr. KENNEDY (for himself, Mr. JEFFORDS, Mr. CHAFEE, Mr. LIEBERMAN, Mr. AKAKA, Mr. BAUCUS, Mr. BAYH, Mr. BIDEN, Mr. BINGAMAN, Mrs. BOXER, Mr. BREAUX, Ms. CANTWELL, Mr. CARPER, Mrs. CLINTON, Ms. COLLINS, Mr. CORZINE, Mr. DASCHLE, Mr. DAYTON, Mr. DODD, Mr. DORGAN, Mr. DURBIN, Mr. EDWARDS, Mr. FEINGOLD, Mrs. FEINSTEIN, Mr. GRAHAM of Florida, Mr. HARKIN, Mr. INOUE, Mr. KERRY, Mr. KOHL, Ms. LANDRIEU, Mr. LAUTENBERG, Mr. LEAHY, Mr. LEVIN, Ms. MIKULSKI, Mrs. MURRAY, Mr. NELSON of Florida, Mr. REED, Mr. REID, Mr. SARBANES, Mr. SCHUMER, Mr. SMITH, Mr. SPECTER, Ms. STABENOW, and Mr. WYDEN) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To prohibit employment discrimination on the basis of sexual orientation.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Employment Non-Dis-
5 crimination Act of 2003”.

1 **SEC. 2. PURPOSES.**

2 The purposes of this Act are—

3 (1) to provide a comprehensive Federal prohibi-
4 tion of employment discrimination on the basis of
5 sexual orientation;

6 (2) to provide meaningful and effective rem-
7 edies for employment discrimination on the basis of
8 sexual orientation; and

9 (3) to invoke congressional powers, including
10 the powers to enforce the 14th amendment to the
11 Constitution, and to regulate interstate commerce
12 and provide for the general welfare pursuant to sec-
13 tion 8 of article I of the Constitution, in order to
14 prohibit employment discrimination on the basis of
15 sexual orientation.

16 **SEC. 3. DEFINITIONS.**

17 (a) IN GENERAL.—In this Act:

18 (1) COMMISSION.—The term “Commission”
19 means the Equal Employment Opportunity Commis-
20 sion.

21 (2) COVERED ENTITY.—The term “covered en-
22 tity” means an employer, employment agency, labor
23 organization, or joint labor-management committee.

24 (3) EMPLOYEE.—

25 (A) IN GENERAL.—The term “employee”
26 means—

1 (i) an employee (as defined in section
2 701(f) of the Civil Rights Act of 1964 (42
3 U.S.C. 2000e(f));

4 (ii) a Presidential appointee or State
5 employee to which section 302(a)(1) of the
6 Government Employee Rights Act of 1991
7 (42 U.S.C. 2000e–16b(a)(1)) applies;

8 (iii) a covered employee, as defined in
9 section 101 of the Congressional Account-
10 ability Act of 1995 (2 U.S.C. 1301) or sec-
11 tion 411(c) of title 3, United States Code;
12 or

13 (iv) an employee or applicant to which
14 section 717(a) of the Civil Rights Act of
15 1964 (42 U.S.C. 2000e–16(a)) applies.

16 (B) EXCEPTION.—The provisions of this
17 Act that apply to an employee or individual
18 shall not apply to a volunteer who receives no
19 compensation.

20 (4) EMPLOYER.—The term “employer”
21 means—

22 (A) a person engaged in an industry affect-
23 ing commerce (as defined in section 701(h) of
24 the Civil Rights Act of 1964 (42 U.S.C.
25 2000e(h)) who has 15 or more employees (as

1 defined in subparagraphs (A)(i) and (B) of
2 paragraph (3)) for each working day in each of
3 20 or more calendar weeks in the current or
4 preceding calendar year, and any agent of such
5 a person, but does not include a bona fide pri-
6 vate membership club (other than a labor orga-
7 nization) that is exempt from taxation under
8 section 501(c) of the Internal Revenue Code of
9 1986;

10 (B) an employing authority to which sec-
11 tion 302(a)(1) of the Government Employee
12 Rights Act of 1991 applies;

13 (C) an employing office, as defined in sec-
14 tion 101 of the Congressional Accountability
15 Act of 1995 or section 411(c) of title 3, United
16 States Code; or

17 (D) an entity to which section 717(a) of
18 the Civil Rights Act of 1964 applies.

19 (5) EMPLOYMENT AGENCY.—The term “em-
20 ployment agency” has the meaning given the term in
21 section 701(c) of the Civil Rights Act of 1964 (42
22 U.S.C. 2000e(c)).

23 (6) LABOR ORGANIZATION.—The term “labor
24 organization” has the meaning given the term in

1 section 701(d) of the Civil Rights Act of 1964 (42
2 U.S.C. 2000e(d)).

3 (7) PERSON.—The term “person” has the
4 meaning given the term in section 701(a) of the
5 Civil Rights Act of 1964 (42 U.S.C. 2000e(a)).

6 (8) RELIGIOUS ORGANIZATION.—The term “re-
7 ligious organization” means—

8 (A) a religious corporation, association, or
9 society; or

10 (B) a school, college, university, or other
11 educational institution or institution of learn-
12 ing, if—

13 (i) the institution is in whole or sub-
14 stantial part controlled, managed, owned,
15 or supported by a religion, religious cor-
16 poration, association, or society; or

17 (ii) the curriculum of the institution is
18 directed toward the propagation of a reli-
19 gion.

20 (9) SEXUAL ORIENTATION.—The term “sexual
21 orientation” means homosexuality, bisexuality, or
22 heterosexuality, whether the orientation is real or
23 perceived.

1 (10) STATE.—The term “State” has the mean-
 2 ing given the term in section 701(i) of the Civil
 3 Rights Act of 1964 (42 U.S.C. 2000e(i)).

4 (b) APPLICATION OF DEFINITIONS.—For purposes of
 5 this section, a reference in section 701 of the Civil Rights
 6 Act of 1964—

7 (1) to an employee or an employer shall be con-
 8 sidered to refer to an employee (as defined in para-
 9 graph (3)) or an employer (as defined in paragraph
 10 (4)), respectively, except as provided in paragraph
 11 (2); and

12 (2) to an employer in subsection (f) of that sec-
 13 tion shall be considered to refer to an employer (as
 14 defined in paragraph (4)(A)).

15 **SEC. 4. DISCRIMINATION PROHIBITED.**

16 (a) EMPLOYER PRACTICES.—It shall be an unlawful
 17 employment practice for an employer—

18 (1) to fail or refuse to hire or to discharge any
 19 individual, or otherwise to discriminate against any
 20 individual with respect to the compensation, terms,
 21 conditions, or privileges of employment of the indi-
 22 vidual, because of such individual’s sexual orienta-
 23 tion; or

24 (2) to limit, segregate, or classify the employees
 25 or applicants for employment of the employer in any

1 way that would deprive or tend to deprive any indi-
2 vidual of employment or otherwise adversely affect
3 the status of the individual as an employee, because
4 of such individual's sexual orientation.

5 (b) EMPLOYMENT AGENCY PRACTICES.—It shall be
6 an unlawful employment practice for an employment agen-
7 cy to fail or refuse to refer for employment, or otherwise
8 to discriminate against, any individual because of the sex-
9 ual orientation of the individual or to classify or refer for
10 employment any individual on the basis of the sexual ori-
11 entation of the individual.

12 (c) LABOR ORGANIZATION PRACTICES.—It shall be
13 an unlawful employment practice for a labor organiza-
14 tion—

15 (1) to exclude or to expel from its membership,
16 or otherwise to discriminate against, any individual
17 because of the sexual orientation of the individual;

18 (2) to limit, segregate, or classify its member-
19 ship or applicants for membership, or to classify or
20 fail or refuse to refer for employment any individual,
21 in any way that would deprive or tend to deprive any
22 individual of employment, or would limit such em-
23 ployment or otherwise adversely affect the status of
24 the individual as an employee or as an applicant for

1 employment, because of such individual's sexual ori-
2 entation; or

3 (3) to cause or attempt to cause an employer to
4 discriminate against an individual in violation of this
5 section.

6 (d) TRAINING PROGRAMS.—It shall be an unlawful
7 employment practice for any employer, labor organization,
8 or joint labor-management committee controlling appren-
9 ticeship or other training or retraining, including on-the-
10 job training programs, to discriminate against any indi-
11 vidual because of the sexual orientation of the individual
12 in admission to, or employment in, any program estab-
13 lished to provide apprenticeship or other training.

14 (e) ASSOCIATION.—An unlawful employment practice
15 described in any of subsections (a) through (d) shall be
16 considered to include an action described in that sub-
17 section, taken against an individual based on the sexual
18 orientation of a person with whom the individual associ-
19 ates or has associated.

20 (f) DISPARATE IMPACT.—Only disparate treatment
21 claims may be brought under this Act.

22 **SEC. 5. RETALIATION PROHIBITED.**

23 It shall be an unlawful employment practice for a cov-
24 ered entity to discriminate against an individual because
25 such individual opposed any practice made an unlawful

1 employment practice by this Act, or because such indi-
2 vidual made a charge, testified, assisted, or participated
3 in any manner in an investigation, proceeding, or hearing
4 under this Act.

5 **SEC. 6. BENEFITS.**

6 This Act does not apply to the provision of employee
7 benefits to an individual for the benefit of the domestic
8 partner of such individual.

9 **SEC. 7. COLLECTION OF STATISTICS PROHIBITED.**

10 The Commission shall not collect statistics on sexual
11 orientation from covered entities, or compel the collection
12 of such statistics by covered entities.

13 **SEC. 8. QUOTAS AND PREFERENTIAL TREATMENT PROHIB-**
14 **ITED.**

15 (a) QUOTAS.—A covered entity shall not adopt or im-
16 plement a quota on the basis of sexual orientation.

17 (b) PREFERENTIAL TREATMENT.—A covered entity
18 shall not give preferential treatment to an individual on
19 the basis of sexual orientation.

20 (c) ORDERS AND CONSENT DECREES.—Notwith-
21 standing any other provision of this Act, an order or con-
22 sent decree entered for a violation of this Act may not
23 include a quota, or preferential treatment to an individual,
24 based on sexual orientation.

1 **SEC. 9. RELIGIOUS EXEMPTION.**

2 This Act shall not apply to a religious organization.

3 **SEC. 10. NONAPPLICATION TO MEMBERS OF THE ARMED**
4 **FORCES; VETERANS' PREFERENCES.**

5 (a) ARMED FORCES.—

6 (1) EMPLOYMENT.—In this Act, the term “em-
7 ployment” does not apply to the relationship be-
8 tween the United States and members of the Armed
9 Forces.

10 (2) ARMED FORCES.—In paragraph (1), the
11 term “Armed Forces” means the Army, Navy, Air
12 Force, Marine Corps, and Coast Guard.

13 (b) VETERANS' PREFERENCES.—This Act does not
14 repeal or modify any Federal, State, territorial, or local
15 law creating a special right or preference concerning em-
16 ployment for a veteran.

17 **SEC. 11. CONSTRUCTION.**

18 (a) EMPLOYER RULES AND POLICIES.—Nothing in
19 this Act shall be construed to prohibit a covered entity
20 from enforcing rules and policies, if the rules or policies
21 are designed for, and uniformly applied to, all individuals
22 regardless of sexual orientation.

23 (b) ASSOCIATION.—Nothing in this Act shall be con-
24 strued to prohibit any association, or infringe upon any
25 right of association, guaranteed by the first amendment

1 to the Constitution, of any nonprofit, voluntary member-
2 ship organization.

3 **SEC. 12. ENFORCEMENT.**

4 (a) **ENFORCEMENT POWERS.**—With respect to the
5 administration and enforcement of this Act in the case of
6 a claim alleged by an individual for a violation of this
7 Act—

8 (1) the Commission shall have the same powers
9 as the Commission has to administer and enforce—

10 (A) title VII of the Civil Rights Act of
11 1964 (42 U.S.C. 2000e et seq.); or

12 (B) sections 302 and 304 of the Govern-
13 ment Employee Rights Act of 1991 (42 U.S.C.
14 2000e–16b and 2000e–16c);

15 in the case of a claim alleged by such individual for
16 a violation of such title, or of section 302(a)(1) of
17 the Government Employee Rights Act of 1991 (42
18 U.S.C. 2000e–16b(a)(1)), respectively;

19 (2) the Librarian of Congress shall have the
20 same powers as the Librarian of Congress has to ad-
21 minister and enforce title VII of the Civil Rights Act
22 of 1964 (42 U.S.C. 2000e et seq.) in the case of a
23 claim alleged by such individual for a violation of
24 such title;

1 (3) the Board (as defined in section 101 of the
2 Congressional Accountability Act of 1995 (2 U.S.C.
3 1301)) shall have the same powers as the Board has
4 to administer and enforce the Congressional Ac-
5 countability Act of 1995 (2 U.S.C. 1301 et seq.) in
6 the case of a claim alleged by such individual for a
7 violation of section 201(a)(1) of such Act (2 U.S.C.
8 1311(a)(1));

9 (4) the Attorney General shall have the same
10 powers as the Attorney General has to administer
11 and enforce—

12 (A) title VII of the Civil Rights Act of
13 1964 (42 U.S.C. 2000e et seq.); or

14 (B) sections 302 and 304 of the Govern-
15 ment Employee Rights Act of 1991 (42 U.S.C.
16 2000e–16b and 2000e–16c);

17 in the case of a claim alleged by such individual for
18 a violation of such title, or of section 302(a)(1) of
19 the Government Employee Rights Act of 1991 (42
20 U.S.C. 2000e–16b(a)(1)), respectively;

21 (5) the President, the Commission, and the
22 Merit Systems Protection Board shall have the same
23 powers as the President, the Commission, and the
24 Board, respectively, have to administer and enforce
25 chapter 5 of title 3, United States Code, in the case

1 of a claim alleged by such individual for a violation
2 of section 411 of such title;

3 (6) a court of the United States shall have the
4 same jurisdiction and powers as the court has to en-
5 force—

6 (A) title VII of the Civil Rights Act of
7 1964 (42 U.S.C. 2000e et seq.) in the case of
8 a claim alleged by such individual for a viola-
9 tion of such title;

10 (B) sections 302 and 304 of the Govern-
11 ment Employee Rights Act of 1991 (42 U.S.C.
12 2000e–16b and 2000e–16c) in the case of a
13 claim alleged by such individual for a violation
14 of section 302(a)(1) of such Act (42 U.S.C.
15 2000e–16b(a)(1));

16 (C) the Congressional Accountability Act
17 of 1995 (2 U.S.C. 1301 et seq.) in the case of
18 a claim alleged by such individual for a viola-
19 tion of section 201(a)(1) of such Act (2 U.S.C.
20 1311(a)(1)); and

21 (D) chapter 5 of title 3, United States
22 Code, in the case of a claim alleged by such in-
23 dividual for a violation of section 411 of such
24 title.

1 (b) PROCEDURES AND REMEDIES.—The procedures
2 and remedies applicable to a claim alleged by an individual
3 for a violation of this Act are—

4 (1) the procedures and remedies applicable for
5 a violation of title VII of the Civil Rights Act of
6 1964 (42 U.S.C. 2000e et seq.) in the case of a
7 claim alleged by such individual for a violation of
8 such title;

9 (2) the procedures and remedies applicable for
10 a violation of section 302(a)(1) of the Government
11 Employee Rights Act of 1991 (42 U.S.C. 2000e–
12 16b(a)(1)) in the case of a claim alleged by such in-
13 dividual for a violation of such section;

14 (3) the procedures and remedies applicable for
15 a violation of section 201(a)(1) of the Congressional
16 Accountability Act of 1995 (2 U.S.C. 1311(a)(1)) in
17 the case of a claim alleged by such individual for a
18 violation of such section; and

19 (4) the procedures and remedies applicable for
20 a violation of section 411 of title 3, United States
21 Code, in the case of a claim alleged by such indi-
22 vidual for a violation of such section.

23 (c) OTHER APPLICABLE PROVISIONS.—With respect
24 to a claim alleged by a covered employee (as defined in
25 section 101 of the Congressional Accountability Act of

1 1995 (2 U.S.C. 1301)) for a violation of this Act, title
 2 III of the Congressional Accountability Act of 1995 (2
 3 U.S.C. 1381 et seq.) shall apply in the same manner as
 4 such title applies with respect to a claim alleged by such
 5 a covered employee for a violation of section 201(a)(1) of
 6 such Act (2 U.S.C. 1311(a)(1)).

7 (d) PROHIBITION OF AFFIRMATIVE ACTION.—Not-
 8 withstanding any other provision of this section, affirma-
 9 tive action for a violation of this Act may not be imposed.
 10 Nothing in this section shall prevent the granting of relief
 11 to any individual who suffers a violation of such individ-
 12 ual’s rights provided in this Act.

13 **SEC. 13. STATE AND FEDERAL IMMUNITY.**

14 (a) STATE IMMUNITY.—A State shall not be immune
 15 under the 11th amendment to the Constitution from a suit
 16 described in subsection (b) and brought in a Federal court
 17 of competent jurisdiction for a violation of this Act.

18 (b) REMEDIES FOR STATE EMPLOYEES.—

19 (1) IN GENERAL.—

20 (A) WAIVER.—A State’s receipt or use of
 21 Federal financial assistance for any program or
 22 activity of a State shall constitute a waiver of
 23 sovereign immunity, under the 11th amendment
 24 to the Constitution or otherwise, to a suit
 25 brought by an employee or applicant for em-

1 ployment of that program or activity under this
2 Act for a remedy authorized under subsection
3 (c).

4 (B) DEFINITION.—In this paragraph, the
5 term “program or activity” has the meaning
6 given the term in section 606 of the Civil
7 Rights Act of 1964 (42 U.S.C. 2000d–4a).

8 (2) OFFICIALS.—An official of a State may be
9 sued in the official capacity of the official by any
10 employee or applicant for employment who has com-
11 plied with the applicable procedures of section 12,
12 for equitable relief that is authorized under this Act.
13 In such a suit the court may award to the prevailing
14 party those costs authorized by section 722 of the
15 Revised Statutes (42 U.S.C. 1988).

16 (3) EFFECTIVE DATE.—With respect to a par-
17 ticular program or activity, paragraphs (1) and (2)
18 apply to conduct occurring on or after the day, after
19 the date of enactment of this Act, on which a State
20 first receives or uses Federal financial assistance for
21 that program or activity.

22 (c) REMEDIES AGAINST THE UNITED STATES AND
23 THE STATES.—Notwithstanding any other provision of
24 this Act, in an action or administrative proceeding against
25 the United States or a State for a violation of this Act,

1 remedies (including remedies at law and in equity, and
2 interest) are available for the violation to the same extent
3 as the remedies are available for a violation of title VII
4 of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.)
5 by a private entity, except that—

- 6 (1) punitive damages are not available; and
- 7 (2) compensatory damages are available to the
8 extent specified in section 1977A(b) of the Revised
9 Statutes (42 U.S.C. 1981a(b)).

10 **SEC. 14. ATTORNEYS' FEES.**

11 Notwithstanding any other provision of this Act, in
12 an action or administrative proceeding for a violation of
13 this Act, an entity described in section 12(a) (other than
14 paragraph (4) of such section), in the discretion of the
15 entity, may allow the prevailing party, other than the
16 Commission or the United States, a reasonable attorney's
17 fee (including expert fees) as part of the costs. The Com-
18 mission and the United States shall be liable for the costs
19 to the same extent as a private person.

20 **SEC. 15. POSTING NOTICES.**

21 A covered entity who is required to post notices de-
22 scribed in section 711 of the Civil Rights Act of 1964 (42
23 U.S.C. 2000e–10) shall post notices for employees, appli-
24 cants for employment, and members, to whom the provi-
25 sions specified in section 12(b) apply, that describe the

1 applicable provisions of this Act in the manner prescribed
2 by, and subject to the penalty provided under, section 711
3 of the Civil Rights Act of 1964.

4 **SEC. 16. REGULATIONS.**

5 (a) IN GENERAL.—Except as provided in subsections
6 (b), (c), and (d), the Commission shall have authority to
7 issue regulations to carry out this Act.

8 (b) LIBRARIAN OF CONGRESS.—The Librarian of
9 Congress shall have authority to issue regulations to carry
10 out this Act with respect to employees and applicants for
11 employment of the Library of Congress.

12 (c) BOARD.—The Board referred to in section
13 12(a)(3) shall have authority to issue regulations to carry
14 out this Act, in accordance with section 304 of the Con-
15 gressional Accountability Act of 1995 (2 U.S.C. 1384),
16 with respect to covered employees, as defined in section
17 101 of such Act (2 U.S.C. 1301).

18 (d) PRESIDENT.—The President shall have authority
19 to issue regulations to carry out this Act with respect to
20 covered employees, as defined in section 411(c) of title 3,
21 United States Code.

22 **SEC. 17. RELATIONSHIP TO OTHER LAWS.**

23 This Act shall not invalidate or limit the rights, rem-
24 edies, or procedures available to an individual claiming

1 discrimination prohibited under any other Federal law or
2 any law of a State or political subdivision of a State.

3 **SEC. 18. SEVERABILITY.**

4 If any provision of this Act, or the application of the
5 provision to any person or circumstance, is held to be in-
6 valid, the remainder of this Act and the application of the
7 provision to any other person or circumstance shall not
8 be affected by the invalidity.

9 **SEC. 19. EFFECTIVE DATE.**

10 This Act shall take effect 60 days after the date of
11 enactment of this Act and shall not apply to conduct oc-
12 ccurring before the effective date.

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